No. 92-633

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

KEVIN FIDEL ROBINSON,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE JUDGMENT SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

GERALD T. ZERKIN
Counsel of Record
GERALD T. ZERKIN & ASSOCIATES
2nd & Franklin Streets
Linden Tower, Suite 505
Richmond, Virginia 23219
(804) 788-4412

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

QUESTION PRESENTED

When considering violation of Doyle v. Ohio, 426 U.S. 610 (1976) on direct appeal, is it consistent with the defendant's constitutional rights to counsel, to remain silent and to due process, to abandon the "harmless error beyond a reasonable doubt" standard in favor of a standard of whether the comment "so infected the trial with unfairness that the ultimate conviction constitutes a denial of due process"?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, before this Court, Kevin Fidel Robinson, and the respondent, the Commonwealth of Virginia.

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APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be ... compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law...."

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to an person with its jurisdiction the equal protection of the laws."

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. _____

KEVIN FIDEL ROBINSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

Petitioner, Kevin Fidel Robinson, respectfully requests that a writ of certiorari issue to review the judgement and opinion of the Virginia Court of Appeals, entered in the above-entitled proceedings on March 10, 1992. This Court

has granted a writ of certiorari in the case of Brecht v. Abrahamson, ___ U.S. ___, 112 S.Ct. 2937, 60 L.W. 3827 (June 8, 1992), to consider the question of whether the Chapman v. California, 386 U.S. 18 (1967) harmless error standard applies to the consideration of Doyle v. Ohio, 426 U.S. 610 (1976) violations upon habeas corpus review. 60 L.W. 3849. The instant case presents the more fundamental question of whether the Chapman standard applies when considering a Doyle violation on direct appeal. In the alternative, petitioner respectfully requests that consideration of his plea for a writ of certiorari, in the instant case, be held pending a decision in Brecht.

OPINIONS BELOW

The per curiam opinion of the Virginia Court of Appeals is reported at Robinson v. Commonwealth, __ Va. App. ___,

__ S.E.2d ___ (1992) and the denial of this petition of appeal to the Virginia Supreme Court are reprinted in the appendix. (App. 1 and App. 14).

JURISDICTION

The Supreme Court of Virginia refused to entertain the petition for appeal on June 16, 1992. The Virginia Court of Appeals affirmed the trial Court on March 10, 1992. This Court has jurisdiction pursuant to 29 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner, Kevin Fidel Robinson, was arrested and charged with the commission of three felonies. At his preliminary hearing on May 10, 1990, the court certified all three charges to the Circuit Court of Chesterfield County. Prior to trial, the Commonwealth withdrew the charge of use of a firearm in the

commission of a felony and petitioner was tried on the remaining two charges, to which he pled not guilty. He was tried and convicted by a jury of two felonies; robbery and entering a banking house armed with a deadly weapon with the intent to commit larceny therein. The trial court, after reviewing a presentence report and hearing argument on petitioner's motion for a mistrial, confirmed the jury's recommended sentence of twenty-five years.

Petitioner appealed first to the Virginia Court of Appeals alleging that his rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I § 8 of the Virginia Constitution had been violated by the Commonwealth when the Commonwealth's Attorney commented on his pre-trial, post-Miranda silence during closing argument. Subsequently, the Virginia Supreme Court

refused to entertain his petition of appeal; thus, petitioner's conviction and sentence were affirmed. Petitioner has thus exhausted all state avenues of appeal available to him.

B. The Facts in This Case

Petitioner, Kevin Fidel Robinson, was arrested and charged with robbery, entering a banking house armed with a deadly weapon with the intent to commit larceny and use of a firearm in the commission of a felony. He was advised of his rights under Miranda v. Arizona, 384 U.S. 486 (1966) and made no statements to any law enforcement official prior to his trial. However, at trial, he testified in his own behalf, denying any involvement in the robbery. The primary evidence against him was the testimony of Debbie Falden, his alleged accomplice.

At the end of the Commonwealth's

case-in-chief, petitioner presented his evidence (which included an alibi) for the first time. (App. 28). The witnesses called on his behalf, testified that at the time of the robbery, petitioner was elsewhere in Virginia. At the close of the evidence, defense counsel moved to strike the Commonwealth's case. This motion was denied.

During closing argument, and after petitioner had tendered his argument to the jury, the Commonwealth Attorney, in rebuttal, as he sought to attack the petitioner's credibility, argued that, unlike the Commonwealth's chief witness, petitioner had not proffered his story (referring to his alibi) prior to his testimony at trial. Defense counsel immediately moved for a mistrial, based on this comment on petitioner's pre-trial silence. During a bench conference, the

Commonwealth Attorney stated, "I don't remember what I said, ..." The defense asked that the statement be read back, but the court refused the request. The Commonwealth Attorney revealed his improper motive, however, when, by way of explaining to the trial judge his earlier comment, he stated; "The burden of proof that can be assumed for the argument is really the fact that he made no statement prior to coming here today and that's the difference between them". (App. 35). The trial court denied the motion for a mistrial.

The jury found petitioner guilty as charged and recommended that he be sentenced to twenty years on the charge of entering a banking house with a deadly weapon and five years on the charge of robbery. Prior to petitioner's sentencing, defense counsel filed a motion

to set judgment aside, based on the prosecutor's improper comment during closing argument. Counsel argued this motion at sentencing and renewed his motion for a mistrial. The Court denied these motions, and imposed the sentence recommended by the jury.

Petitioner appealed to the Virginia Court of Appeals upon two issues. The court granted his petition as to one issue, based upon the prosecutor's comment in closing argument referring to petitioner's pretrial silence, and denied the petition as to the second, unrelated issue. Following argument on the merits of this claim, the court affirmed petitioner's conviction. He then appealed to the Virginia Supreme Court, which refused to entertain his Petition of Appeal, from which decision he now appeals.

REASONS FOR GRANTING THE WRIT

This Court has granted a writ of certiorari on a substantially similar question, although the question presented here is more fundamental, in that it raises the same underlying legal issue in the context of direct appeal, rather than on collateral review. See, Brecht, supra. If the decision of the Virginia Court of Appeals is allowed to stand, the Court will have entirely abrogated the Chapman standard in connection with alleged violations of Doyle v. Ohio.

A. The Trial Court Erred In Denying Appellant's Motion For A Mistrial And Motion To Set Judgment Aside Following The Prosecutor's Comment Regarding Appellant's Pretrial Silence.

Under the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment, it is improper for the prosecutor or the

Court to comment on the failure of the accused to testify at trial. Griffin v. California, 380 U.S. 609 (1965). In Griffin, the Supreme Court invalidated a California statute which allowed comment by the prosecutor or the Court regarding the accused's failure to testify and the inference of guilt which could be drawn from such silence. The Court held that such comment was tantamount to "a penalty imposed by courts for exercising a constitutional privilege . . . making its assertion costly." Id. at 613. The Court went on to say that "what the jury may infer, given no help from the court, is one thing. What it may infer when the Court solemnizes the silence of the accused into evidence against him is quite another." Id. at 614.

This same reasoning applies to the pre-trial silence of the accused. In

Miranda v. Arizona, supra, the Supreme Court outlined the Fifth Amendment right of the accused to remain silent, holding that this right attaches when the accused is first subjected to custodial interrogation by the police and that "the privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way . . ." Id. at 467. Referring to Griffin and earlier related cases, the Court stated that it is "impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." Id. at 467, footnote 24, 25. Together, Griffin and Miranda

indicate that the right to remain silent -- and consequently, the bar against prosecutorial comment regarding exercise of that right -- attaches when the accused is first subjected to custodial interrogation and continues throughout the judicial process.

In Doyle, the defendant exercised his Fifth Amendment right to remain silent upon arrest for distribution of marijuana, but testified at trial, offering for the first time an exculpatory story involving a frame-up. The prosecutor sought to impeach this testimony on cross-examination by asking why the defendant had not presented this story to the authorities upon arrest. The Supreme Court reversed the conviction, holding that this use of the defendant's post-arrest silence by the prosecution was improper because while Miranda warnings

"contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." Id. at 618. The Court went on to say that it is "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618; see also, Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), (holding that the prosecutor's argument that defendant's pre-trial silence was evidence of his sanity was reversible error). The Wainwright court clearly stated that "states may not draw even well-justified inferences form post-warning silence". Brecht v. Abrahamson, 944 F.2d. at 1369; quoting, Wainwright v. Greenfield, supra.

In this case, petitioner elected not to make a statement to the police after receiving Miranda warnings, and not to testify at his preliminary hearing. He testified at trial, presenting his alibi for the first time. (App. 28). He had an absolute right to remain silent and to present this alibi for the first time at trial, without penalty. The prosecutor's reference to the fact that petitioner had not previously told this story, for the specific purpose of contrasting his credibility with that of Ms. Falden, who, he reminded them, had previously told her story, was undeniably a reference to the fact that petitioner had elected to remain silent prior to trial. This prosecutorial act penalized the petitioner for asserting his right to remain silent as outlined in

Miranda and in clear violation of Doyle.[1]

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[1]. Contrary to the argument of the prosecutor in the trial court, and of the Attorney General in the Court of Appeals, it is of no moment that the jury was unaware of the fact that petitioner had been advised of his Miranda rights. As each of the cases discussed above indicates, the question is whether the defendant has been prejudiced by his post-Miranda silence. That prejudice occurs, of course, by virtue of the comment on that silence, regardless of whether or not the jury is aware that his silence was, in fact, post-Miranda. Indeed, it is likely more prejudicial when the jury, as here, does not know that the defendant's silence was induced by the police, because then the jury does not even have an explanation for his silence. There is no reference to Miranda warnings in the detailed recitation of the relevant examination in Doyle, and the Court's discussion includes no references to the Miranda warnings, indicating that either no such reference was made, or, at a minimum, this Court did not consider the absence of such a reference before the jury to be relevant to its determination of the issue.

B. The Court Of Appeals Erroneously Applied A Standard Of Applicable Only To Habeas Corpus Review.

The Virginia Court Of Appeals avoided the Doyle violation by incorporating the prejudice analysis into the analysis of the violation itself.[2] In its analysis, the court abandoned the well-established Chapman harmless error standard for a standard adopted by the Fourth Circuit Court of Appeals for federal habeas review of Doyle violations occurring in state prosecutions. Citing Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990), cert. denied, 111 S.Ct. 2277 (1991 the court held that "the critical inquiry in a Doyle analysis "is whether the disputed

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[2]. Of course, it is of no significance whether the prejudice of the comment is considered as part of the process of determining whether there was, in fact, a Doyle violation, or whether it is considered as part of a prejudice analysis subsequent to the finding of a Doyle violation.

statement so infected the trial and sentencing with unfairness that the ultimate conviction and sentence constituted a denial of due process." Slip. Op. at 5. Although the Fourth Circuit did not specifically so state, it is apparent from its decision that it was applying a standard it considered applicable to federal habeas corpus proceedings, since the authority to which it cited for that standard, Darden v. Wainwright, 477 U.S. 168 (1986), explicitly referenced the "standard of review for such a claim on writ of habeas corpus...." Id. at 181.

Darden is not applicable here. This Court specifically noted that its analysis depended, in part, on the fact that, unlike the statements at issue here, the improper statements of the prosecutor "did [not] implicate other specific rights of

the accused such as the right to counsel or the right to remain silent." Id. at 182. Thus, implicitly, even Gaskins stands for the proposition that where, as here, improper prosecutorial comment implicates specific rights, it violates the defendant's constitutional rights. In any event, it is perfectly clear that the standard set forth in Gaskins relates only to the review of Doyle violations by federal habeas corpus courts, and is not applicable to the review of such claims on direct appeal.[3]

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[3] Gaskins also is inapplicable on the facts. In that case, the prosecutor did not directly reference the defendant's pretrial silence at all; he simply referred to the fact that certain facts were uncontradicted. Gaskins predicated his Doyle claim on the fact that only he could have contradicted some of the facts listed by the prosecutor, a conclusion which the Court specifically rejected. 916 F.2d at 951. By contrast, of course, this prosecutor explicitly referenced Robinson's failure to testify, by stating that, unlike his alleged accomplice, he

C. The Prosecutor's Reference to the Petitioner's Pre-trial Silence Was Not Harmless Error

This Court clearly decided in Chapman, 386 U.S. at 24, what constitutes harmful error. Here, the "error complained of ... contribute[d] to the verdict obtained"; or phrased alternatively, that the error "... influence[d] the jury's verdict." Id. at 24. [W]hether an error is harmless is established through a case-by-case determination, reached after weighing the prejudicial effect of the improper evidence against the probative value of the properly admitted evidence." Williams v. Zahradnick, 632 F.2d 353, 361 (4th Cir. 1980). Among the factors to be considered are (a) the use of the post-arrest silence and (b) the party which elected to make

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was telling his story for the first time.

use of the silence. Id.

A careful reading of the trial transcript confirms that the Doyle violation was not harmless. As noted above, when challenged, the prosecutor stated that the purpose of his argument was to show that the difference between petitioner and Falden was

> that he [petitioner] made no statement prior to coming here today and that's the difference between the two of them.... She made the statement before.

(App. 36). The prosecutor had also earlier argued Falden's credibility based upon the fact that she had told her story previously, although, on that occasion he did not then contrast that with petitioner's contrary conduct. (App. 34).

In this case, the prejudicial reference was made with deliberation and with the specific intention of attacking

the petitioner's credibility and, thus, his exculpatory defense. The reference to petitioner's post-Miranda silence, used as it was to both attack the petitioner's defense and to bolster the credibility of the Commonwealth's primary witness, surely played a pivotal role in the jury's deliberations. See United States v. Diezel, 608 F.2d 204, 208 (5th Cir. 1979). The prosecution had relied primarily upon the testimony of Ms. Falden, who admitted being an accomplice in the bank robbery. Her testimony focused on events after Robinson's alleged departure from the bank, specifically regarding her role in driving the getaway car and going back with the perpetrator of the robbery in search of the briefcase.

The only other evidence offered which could even arguably corroborate her testimony connecting Robinson to the crime

was that of Thomas Hudson, a customer in the bank, who identified Robinson as the perpetrator. His testimony focused primarily upon events inside the bank at the time of the robbery. On cross-examination, however, Hudson was unable to confirm or deny that he had told FBI agents on the day of the robbery that he was unable to identify the robber because he had been too far away. When shown Commonwealth's exhibits 1A through D -- photographs of the perpetrator taken at the bank -- he testified that the man he saw had been dressed differently and he could not positively identify him as the man who robbed the bank. He further admitted that four days after the robbery, he was unable to pick out the robber from six photographs that were shown to him, and that he did not identify Robinson as the bank robber until the preliminary

hearing, some four months after the robbery. (App. 22).

Hudson's identification of Robinson as the robber was sufficiently impeached that the jury had the right and could reasonably have rejected his identification testimony. See, e.g., Belton v. Commonwealth, 200 Va. 5, 104 S.E.2d 1 (1958). Thus, the prosecutor's use of petitioner's post-Miranda silence to contrast his credibility with that of the Commonwealth's chief witness could not be deemed harmless error. See United States v. Harp, 536 F.2d 601, 602-03 (5th Cir. 1976).

CONCLUSION

For the foregoing reasons, the petitioner, Kevin Fidel Robinson, respectfully requests that a writ of certiorari issue to review the judgment of the Virginia Supreme Court entered in the

above-entitled proceedings on June 16, 1992, refusing to review the judgment and opinion of the Court of Appeals, entered on March 10, 1992. or in the alternative that his request for a writ of certiorari be held, pending a determination in Brecht v. Abrahamson.

Respectfully submitted,

* GERALD T. ZERKIN

SHARON A. BAPTISTE

Linden Tower Professional Centre
Suite 505, 2nd and Franklin Streets
Richmond, Virginia 23219

* Counsel of Record

September 1992

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Koontz, Judges Elder and Bray
Argued at Richmond, Virginia

OPINION BY JUDGE RICHARD S. BRAY
March 10, 1992

KEVIN FIDEL ROBINSON
v. Record No. 1373-90-2
COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF CHESTERFIELD COUNTY

William R. Shelton, Judge

Gerald T. Zerkin (Kelly H. Brandt; Robert Godfrey; Gerald T. Zerkin & Associates, on brief), for appellant.

Eugene Murphy, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

Kevin Fidel Robinson (defendant) was convicted of robbery and entering a bank armed with a deadly weapon with the intent to commit larceny and was sentenced, in accordance with the jury's verdict, to twenty-five years imprisonment. On appeal, defendant contends that the Commonwealth's Attorney improperly

commented on his exercise of his right to remain silent,[1] and the trial court erred by denying his resulting motion for a mistrial. We disagree and affirm.

The record discloses that Thomas Hudson (Hudson), while "turning right to go into the bank," noticed a "man walking along the street with a briefcase under his arm." As he entered the bank moments later, Hudson "looked back out the door" and the same man was "coming up the driveway of . . . the bank's drive-in." Hudson testified that the man then "came through the door with [a] gun" and proceeded to rob the bank. The man was wearing a mask at the time of the robbery, but Hudson recognized "the same clothes" and "the same briefcase in his hands."

Immediately after the robbery, Hudson followed the man, who "didn't have a mask

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[1] U.S. Const. amend V.

on then," and observed him "getting in the getaway car." At trial, Hudson identified defendant as the robber and Debbie Falden (Falden) as "the lady driving the car."

Another witness had seen defendant "pitch the briefcase" into her front yard before being "picked up" by a car. The police retrieved the briefcase, which contained "some bullets" and $909, the "exact amount of money missing from the bank."

Falden admitted that she drove defendant to the bank and next "saw [him] running down the street," "with a briefcase," and "[s]omeone in a car . . . was like following him." Falden "kept riding around," "found" and "picked up" defendant, who immediately stated, "it didn't work." Falden denied any prior knowledge of defendant's intention to rob the bank.

Following his arrest, defendant made

no statement to the police, but testified at trial that he had been out of town on business at the time of the robbery.

In closing argument, the Commonwealth's Attorney commented to the jury that defense counsel had:

> started talking about Debbie Falden and the fact that she said she would lie to keep from going to prison . . . [Y]ou really can't judge her by that standard because . . . [e]verything she said here today is after she has been charged . . . Kevin Robinson stands in different shoes. Because you see, Kevin Robinson stands to go to the penitentiary and everything he said today is the first time and everything he said today determined whether he goes or not, so to suggest --

At that point, defendant made a motion for mistrial, arguing that the Commonwealth's Attorney had improperly commented upon defendant's exercise of his right to remain silent. The trial court overruled

defendant's motion.

In Doyle v. Ohio, 426 U.S. 610 (1976), the Supreme Court considered the use for impeachment purposes of a defendant's silence "at the time of arrest and after receiving Miranda warnings." Id. at 619. In Doyle, the defendants claimed for the first time at trial that they had been framed. Id. at 613. The trial court, over objection, permitted the prosecutor to cross-examine the defendants concerning their failure previously to relate this account to police. Id. Relying upon Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that the use for impeachment purposes of a defendant's silence, following Miranda warnings, violates the Due Process Clause of the Fourteenth Amendment. Id. at 619. The Court noted that the Miranda warnings carry an implicit assurance that a defendant's decision to remain silent

"will carry no penalty." Id. at 618.

Subsequently, in Durant v. Commonwealth, 7 Va. App. 454, 375 S.E.2d 396 (1988), this Court found that references by the Commonwealth "to [Durant's] post-arrest, post-Miranda warnings silence both during cross-examination of Durant and in closing argument" violated Doyle and required reversal of the conviction. Id. at 460, 375 S.E.2d at 398. The Commonwealth had asked Durant "why she did not tell the whole story to the police," and referred during closing argument to Durant's "decision to speak with an attorney rather than telling the police the whole story," both obvious references to her exercise of her constitutional rights. Id. at 458, 375 S.E.2d at 398.

Similarly, in Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980), the Fourth Circuit concluded that Doyle was

controlling on the issue of whether "the raising of defendant's postarrest silence invaded his constitutional rights."[2] Id. at 357, 360. There, the prosecutor asked the defendant "a series of questions concerning why he had not related [his] story to the police." Id. at 360. In closing argument, the prosecutor again referred to the defendant's post-arrest silence, commenting, "When did [defendant] come forward with [this story]? Today in Court. Use your common sense." Id. at 357. The court determined that these repeated references to the defendant's silence were impermissible under Doyle.

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[2] Factors which the court considered material to this determination include: (1) the use to which the prosecution puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and, (5) the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions. Williams 632 F.2d at 361-62.

The Fourth Circuit again considered prosecutorial comments in the context of Doyle in Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990), cert. denied, 111 S.Ct. 2277 (1991). There, the prosecutor stated in closing argument "that he wished to talk to the jury 'about what is not in dispute in this case.'" He then proceeded to discuss "pieces of evidence" which only the accused "could have disputed," a subtle reference to the silence of the accused before and during trial. Id. at 951. The court found this argument "did not constitute a Doyle violation," explaining that the critical inquiry in a Doyle analysis "is whether the disputed statement so infected the trial and sentencing with unfairness that the ultimate conviction and sentence constituted a denial of due process." Id.

Against this standard, a single comment, which only vaguely and indirectly

referenced the defendant's post-arrest silence, does not violate Doyle. In both Durant and Williams, defendants were repeatedly questioned with respect to their failure to relate an exculpatory story to the police prior to trial, conduct which was then argued to the jury. In contrast, the prosecutor in Gaskins alluded to the accused's silence only indirectly and in a single remark.

In the instant case, defendant was not cross-examined with respect to his failure to relate any alibi to police. The Commonwealth's Attorney merely argued to the jury that Falden had already admitted her participation in the crime and had "been charges,: while "everything [defendant] said today is the first time." The jury may not have even related this isolated comment to defendant's post-arrest silence. Clearly, however, it did not "so infect" the trial with "unfairness

that the ultimate conviction" constituted a denial of due process. Gaskins, 916 F.2d at 951.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

VIRGINIA:

IN THE SUPREME COURT

KEVIN FIDEL ROBINSON,

Appellant,

v. RECORD NO. 920468

COMMONWEALTH OF VIRGINIA,

Appellee.

RESPONSE TO MOTION FOR BOND

The Commonwealth, by counsel, in response to the motion for bond pending certiorari states the following:

1. The appellant has been at liberty for over two years since commission of his crime in January of 1990.

2. On August 17, 1990 he was sentenced to twenty-five years imprisonment for entry of a bank and robbery. During the robbery the defendant displayed a firearm.

3. Appellant's claim that he may

well be granted certiorari by the United States Supreme Court is speculative at best. Contrary to the statement in his motion, there was no Doyle violation found by the Court of Appeals. (Appellee's Exhibit A). Since there was no such violation, it is highly unlikely that the Supreme Court will consider it necessary to take any action in the case based on the claim that the harmless error rule was inappropriately applied.

WHEREFORE, the Commonwealth prays that the motion to continue on bond pending certiorari be dismissed and denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,

By_____
Counsel

Mary Sue Terry
Attorney General of Virginia

Eugene Murphy
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of July, 1992, a copy of the foregoing response to motion for bond was mailed to Gerald T. Zerkin, Esquire, Linden Tower Professional Center, Suite 505, Second and Franklin Streets, Richmond, Virginia 23219, counsel for appellant.

_____

Eugene Murphy
Assistant Attorney General

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on **Tuesday** *the* **16th** *day of* **June**, **1992.**

Kevin Fidel Robinson,

Appellant,

against Record No. 920468

Court of Appeals No. 1373-90-2

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Kennan did not participate in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

Q Was the individual that came into the bank and robbed it approximately 5 feet 8 inches tall to your recollection?

A Well, to my recollection, I estimated to the investigators that his height was 5'7 to 8 inches tall. Okay.

Q And did you not tell the same investigators that the individual was stocky with wide shoulders?

A Yes, I did. I said he had stocky shoulders.

Q Stocky shoulders?

A Shoulders particularly.

Q So we're talking like an athlete?

A Through the shoulders.

Q Wide shoulders?

A Yes, sir.

Q And was it your, is it your recollection that the robber did not have a real dark complexion?

A Well, he didn't appear to me to have a real dark complexion on that particular day.

Q Well, that's the day we're talking about.

A That's right.

Q And with reference to his dress, is it your recollection that he had on a black jacket, a windbreaker type?

A Yes, sir. I do remember he had on a windbreaker type jacket and I thing probably that gave him a more bulky set of shoulders and chest area.

Q Well, that's not my question. My question is do you recall him wearing a black windbreaker type jacket?

A Yes.

Q And do you recall him wearing faded blue jeans?

A Yes.

Q And I believe you already testified today that the individual that you saw rob the bank was not wearing glasses?

Mr. Von Schuch: Judge, again if he has got a question or if he is referring to a specific question and answer, it is appropriate to read it to him and give him a chance --

The Court: Are you asking him a question or are you asking him if he has testified before about that?

Mr. Boone: I'm not sure. Let me clarify.

Q Was the person who robbed the bank wearing glasses?

A I could not say

whether he was wearing glasses or not.

Q You said well, I believe you saw the individual that robbed the bank shortly before he came into the bank when you were driving towards the bank. Correct?

A Correct.

Q You came within 10 feet, your car came within 10 feet of the person?

A Sure.

Q At that time was the individual wearing a mask?

A No.

Q Did you have an opportunity to see his face at that point?

A Yes.

Q Can you remember if he had on eyeglasses?

A No.

Q No, he didn't or no, you can't remember?

A No, I can't remember.

Q Why is it if you can't remember if he had on eyeglasses that you can come into this courtroom and say that this is the man that robbed the bank?

Mr. Von Schuch: Objection, argumentative.

The Court: I think it is a proper question.

A Well, I got a good look at that man. When I passed him, I got a good look at him. When he came into the bank, he had a mask on but I looked at the man when he come into the bank face to face. I watched him throughout him going through four drawers and I watched him when he came back down the aisle and I wasn't trembling or in fear of anything. I looked [illegible] good and as close as I was to him [illegible] no doubt in my mind that that is the same man that held up the bank down there.

Q But you can't say whether he had on glasses?

A I can't.

Mr. Boone: Judge I have --

A Looking at that photo --

The Court: I don't think it is proper for you to question him about what that photo shows. He testified what he saw and that is what you are dealing with.

Q The person that you saw, do you see that person in the photographs that you are now holding, Commonwealth's 1A through D?

A Well, no. This looks like he has got a white shirt and a neck tie on and a jacket open. The man that robbed the bank didn't have a white shirt. Well, I can't say he didn't have a white shirt but he had his jacket zipped up. It was no tie hanging down in front of him like you see here.

Q So are you saying that person in the photographs is not the person you saw rob the bank?

A I'm not saying it's not the person. But this jacket, the jacket being, hanging open and the neck tie hanging down, it wasn't like that. It could have had the neck tie on, I'm not saying he didn't have the tie on. I'm saying he didn't have the jacket open and the white shirt the day he robbed the bank.

A Yes, he looks like the same man.

Q You can go a step further and say it is the same man.

A It is the same man.

Q But you can't do that with the man in the photograph?

A Well, the photograph is not like in person.

Q Yes, sir. Now, when you spoke with the police shortly after the robbery, you also spoke to an FBI agent by the name of Michael Kessler, did you not?

A Yes, sir.

Q Did you tell Michael Kessler what you had seen with reference to the robber?

A I believe I gave him a full statement exactly what I seen.

Q Did you describe the

bank robber to Michael Kessler of the FBI?

A I'm sure I did.

Q Did you, and I'll specifically ask you with reference to Mr. Kessler, did you tell Mr. Kessler I can't identify the robber because he was too far away from me to see?

A I don't recall telling him that.

Q But you don't deny that you told him that?

A I gave a lot of statements down there to different people that day and I can't deny or confirm it.

Q That goes right to the heart of your identification, does it not?

Mr. Von Schuch: Judge, objection.

The Court: Sustained.

Q When you were shown the black and white photos four days after the bank robbery, you could not pick out

any of the photographs as depicting the bank robber, could you?

A No.

Q How many photographs were you shown, sir?

A I believe it was six, if my memory was correct. They were poor quality photographs.

Q And in fact, you never told anybody, including Mr. Von Schuch, that you could identify Kevin Robinson as the bank robber until I asked you that question in the preliminary hearing on May 10th. Is that correct?

Mr. Von Schuch: Objection. There is no evidence that I ever asked him or talked to him.

Mr. Boone: I'm not asking him if Mr. Von Schuch asked him. My question is --

The Court: Mr. Hudson, before you answer the question,

before you answer the question --

Mr. Hudson: Yes, sir.

The Court: Rephrase the question.

Q From January --

The Court: Restate the question.

I'm sorry.

Mr. Boone: Yes, sir.

Q Did you ever tell anyone that Kevin Robinson sitting next to me was the bank robber before I asked you that question on May 10, 1990, at the preliminary hearing in the Chesterfield General District Court?

A No.

Q Tell the jury why.

A On Wednesday the 24th of January, we had an automobile auction. Atlantic Financial, they bring cars from different repossession locations and bring them to Summs where they hold the auction and all of the cars that were prepared for the auction were inside the building and there was no place to put any of the cars I had repossessed. That's why they were on the street.

Q Now, with reference to Mr. Luther Johnson, did you have occasion to go to his residence?

A Yes, I was. Yes, on the 25th of January, the owner of the company, Brock Summs, sent me to pick up Mr. Fauntleroy's truck, I'm sorry, Mr. Luther Johnson's car. It was supposed to be a GMAC give-up and they told me the car would be waiting there and that someone

would be waiting there with the keys.

Q So it was your understanding it would be waiting for you, you could pick it up and bring it back?

A Yes, sir.

Q Did you, in fact, meet with Mr. Luther Johnson?

A Yes, sir. I went to Callao, which is where he lives, and Mr. Johnson was there. I did not see a vehicle so I was not sure it was his home. He was out in the yard in his little garden, which is directly behind his house; and I identified myself and told him I was there to pick up his car.

Q What time of day or night was that?

A It was approximately 1 o'clock to 1:30.

Q And that's on the date the bank was robbed?

A Yes, sir.

Q What happened, what did you do next?

A Okay. After I spoke with Mr. Johnson, I asked him --

Q We don't need to know what he told you but was the car there?

A The car wasn't there and he told me to return.

Q Don't tell us what he told you, just what you did.

A I left.

Q Where did you go?

A I went down to the Richmond County elementary school, I believe it is.

Q For what purpose?

A To pick up another vehicle because I knew it would be there as well.

Q If the sheriff can show you the, I guess it is defense exhibit number 1, the paperwork with

reference to the Dodge Ram, I want to ask you, sir, if you recognize that exhibit.

A Yes, sir.

Q Did you fill that out?

A Yes, sir.

Q And the date on that is what?

A The date on that is the 25th of January.

Q Is that the date you repossessed that Dodge Ram.

A Yes, sir.

Q Is that the same Dodge Ram that Mr. LaFevere asked you to put on the lot on January 26th?

A Yes, it is.

Q Why wasn't that Dodge Ram already on the lot?

A Because the, there was still auction cars inside the garage and there was no space to put any more cars.

Q Do you have any doubt

in your mind that you picked up that Dodge Ram on January 25th?

A No, sir.

Q Do you recall what time -- Well, after you picked that up, approximately what time was that you picked that up?

A Approximately I will say between 1:45 and 2:15.

Q What did you do with it?

A I drove it back to Richmond.

Q Did you have the tow truck?

A No, the tow truck had broke down when I brought back the Volvo, which was on Wednesday. The tow truck had brock down so I was driving my brother's car.

Q So how did you get two cars back from Warsaw?

A I had -- Mr. Fauntleroy told me I could leave my car in his front yard.

Q Did you do that?

A Yes, sir.

Q You drove the Ram itself back?

A Yes, sir.

Q What vehicle did you leave there in Mr. Fauntleroy's yard?

A I left a blue Tempo. It was a rental car.

Mr. Von Schuch:

The first time she told that story was not from the witness stand when she had something to gain, that maybe she can help herself if she got up there to please the Commonwealth and all of the FBI. No, she told that story right in the beginning before she was ever charged with anything . . .

Mr. Von Schuch:

Mr. Von Schuch: Everything she said here today is after she has been charged, after she has been -- after she is subject to life and after she already told the same thing to somebody else. Kevin Robinson stands in different shoes. Because you see, Kevin Robinson stands to go to the penitentiary and everything he said today is the first time and everything he said today determines whether he goes or not, so to suggest --

Mr. Boone: Your Honor, at this time I'm moving for a mistrial. It's my position that Mr. Von Schuch just commented on my client's right to remain silent subsequent to his arrest and pursuant to his 5th Amendment right. He just told you for the first time today, Mr. Kevin Robinson's position is what he has to say. That is what he

tells the jury with reference to what he did or did not do and it is my position that is commenting on his constitutional right to remain silent and I ask for a mistrial.

Mr. Von Schuch: Judge, the comment was made regarding the -- I don't remember what I said, the first time he testified, the first -- Mr. Boone: I ask that it be read back. The Court: I can recall what he said. I don't need it read back.

Mr. Von Schuch: It is my position that I made no comment whatever and there is no evidence before this jury that he ever had been questioned or advised of his rights or any statement was taken from him or refused from him. The burden of proof that can be assumed from the argument is really the fact that he made no statement prior to coming into here today and that's the difference

between the two of them. The defendant here today is subject to jeopardy. She made the statement before.

Mr. Boone: I want it read back.

The Court: Overruled. I'll overrule your objection.

FILED
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No. 92-635

In The
Supreme Court of the United States
October Term, 1992

KEVIN FIDEL ROBINSON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

MARY SUE TERRY
Attorney General of Virginia

*EUGENE MURPHY
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

WHETHER PETITIONER HAS PROVIDED ANY REASON WARRANTING THIS COURT'S REVIEW OF THE VIRGINIA COURTS' FACT-BOUND DETERMINATION THAT NO *DOYLE* ERROR OCCURRED IN THIS CASE?

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No. 92-633

In The

Supreme Court of the United States

October Term, 1992

KEVIN FIDEL ROBINSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

This Court's jurisdiction is grounded upon 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in the Petition for Writ of Certiorari at vi.

STATEMENT OF THE CASE

On July 12, 1990 in the Circuit Court of the County of Chesterfield petitioner was convicted of entering a banking house armed with a deadly weapon and robbery. On August 19, 1990 he was sentenced to a total of twenty-five years imprisonment.

The Virginia Court of Appeals affirmed the convictions in an unpublished opinion on March 10, 1992. (App. 1-10).[1]

The Virginia Supreme Court denied an appeal therefrom on June 16, 1992. (App. 14-15).

STATEMENT OF FACTS

On January 25, 1990, as Thomas Hudson was entering a bank in Chesterfield County, he observed the petitioner standing outside. (App. 1). The petitioner was not disguised in any way and was carrying a briefcase under his arm. (App. 2). After Hudson had entered the bank, the petitioner entered and robbed the bank. (App. 2). Although the petitioner was then wearing a mask, Hudson could identify him because he was wearing the same clothes and carrying the same briefcase. (App. 2). When the petitioner left the bank after the robbery, Hudson followed him in his own car. (App. 2-3). He saw the petitioner getting into the get-away car. (App. 3).

In court Hudson made a positive identification of the petitioner as the man he had seen standing outside the

[1] References are to petitioner's appendix.

bank and later getting into the get-away car. (App. 2-3). He also identified Debbie Falden, petitioner's girlfriend, as the driver of that car. (App. 7).

Another witness had observed a man resembling the petitioner throw a briefcase under a tree in her front yard located near the bank. (App. 3). The briefcase contained bullets, car keys and $909, the sum of money which had been taken from the bank during the robbery. (App. 3).

Debbie Falden testified that she had driven the petitioner, who was carrying a briefcase, to the bank. (App. 3). When petitioner later emerged from the bank and ran by her with the briefcase, he was being followed by a car. (App. 3). After riding around the neighborhood, she found and picked up the petitioner who immediately said that "it didn't work." (App. 3).

The petitioner's former girlfriend, Debbie Falden, testified against him at trial. Petitioner then testified in his own behalf. During closing argument defense counsel stated that Ms. Falden may not have been telling the truth because she was attempting to avoid going to prison. In his rebuttal argument the Commonwealth's Attorney restated defense counsel's argument and replied:

> The problem with that is that you really can't judge her by that standard because the reason she is going to prison is because she told the truth when she wasn't in jeopardy. This doesn't place her in jeopardy. She is already in jeopardy. Everything she said here today is after she has been charged, after she has been – after she is subject to life and after she already told the same thing to somebody else. Kevin Robinson stands in different shoes. Because you see Kevin

> Robinson stands to go to the penitentiary and everything he said today is the first time and everything he said today determines whether he goes or not, so to suggest –

(App. 35). At that point the prosecutor was interrupted by a motion for a mistrial which was denied.

REASONS FOR DENYING THE WRIT

I. The Prosecutor's Comment Did Not Involve Any Infringement Of The Petitioner's Fifth Or Fourteenth Amendment Rights.

Petitioner argues that a comment made by the Commonwealth's Attorney during closing argument infringed his Fifth Amendment right to remain silent and his right to due process. He has provided, however, no "special and important" reason warranting certiorari review. *See* Rule 10.1. A mere claim that the court below erred in applying *Doyle v. Ohio*, 426 U.S. 610 (1976), is insufficient to merit certiorari review. *See Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The prosecutor, moreover, never made any comment on the exercise of petitioner's right to remain silent after being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Any indirect reference thereto was insufficient to constitute a Fifth Amendment violation.

In responding to defense counsel's attack on Falden's testimony, the prosecutor merely stressed that the petitioner had more reason than Falden to fabricate his testimony because she had already incriminated herself. Moreover, there was no evidence before the jury that the

petitioner had been warned or questioned by the police. In the absence of any evidence that Robinson received *Miranda* warnings and invoked his right not to speak to the police, there could not have been a *Doyle* violation. *See Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

The prosecutor did not argue that the petitioner's testimony at trial was unworthy of belief because he had failed to give the same explanation to the police. As a consequence, this case is clearly distinguishable from *Doyle*.

In *Doyle* the prosecution made clear to the jury that the defendants had been given *Miranda* warnings, were questioned by the police and had not told them the story which they presented at trial. The prosecutor was even permitted to ask the following questions:

> "[I]f that is all you had to do with this and you are innocent, when [the police officer] arrived on the scene why didn't you tell him."
>
> "But in any event you didn't bother to tell [the police officer] anything about this?"
>
> "But you didn't protest your innocence at that time?"

426 U.S. at 614 and n. 5. Additionally the prosecutor told one of the defendants that "[I]nstead of protesting your innocence, as you do today, you said in response to a question of [the police officer], 'I don't know what you are talking about.' " 426 U.S. at 614 n. 5. Nothing remotely similar occurred in the instant case.

Petitioner also argues that the Virginia Court of Appeals applied the wrong standard for determination of

harmless error after a *Doyle* violation. The Virginia Court of Appeals, however, never addressed harmless error because it concluded that there had been no *Doyle* error: "a single comment which only vaguely and indirectly referenced the defendant's post-arrest silence, does not violate *Doyle*." (App. 8-9). The Court went on to hold:

> [Robinson] was not cross-examined with respect to his failure to relate any alibi to police. The Commonwealth's Attorney merely argued to the jury that Falden had already admitted her participation in the crime and had "been charges,: [sic] while everything [petitioner] said today is the first time." The jury may not have even related this isolated comment to defendant's post-arrest silence. Clearly, however, it did not "so infect" the trial with unfairness that the ultimate conviction "constituted a denial of due process." (App. 9-10).

(App. 9-10).

In any event, the evidence against the petitioner was overwhelming and any possible *Doyle* error was harmless. *See Chapman v. California*, 386 U.S. 18 (1967).[2] The petitioner was identified by a citizen eyewitness who had seen him without his mask outside the bank before and after the robbery. That witness followed the petitioner and observed him getting into a vehicle driven by Falden.

---

[2] Because no *Doyle* violation occurred in this case, and because, if error occurred, the *Chapman* standard of harmless error has been satisfied, this Court's granting of certiorari in *Brecht v. Abrahamson*, 112 S.Ct. 2937 (1992), has no bearing on this case. The issue in *Brecht* is whether a "lesser" standard of harmless error should be applied to *Doyle* errors.

Falden testified that she had driven the petitioner to and from the bank. Moreover, the briefcase which petitioner had carried into the bank and discarded in the neighborhood of the bank was found to contain the money stolen from the bank during the robbery. In view of the strength of this evidence, the matter about which Robinson complains is clearly *de minimis*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY SUE TERRY,
Attorney General of Virginia

*EUGENE MURPHY,
Assistant Attorney General

*Counsel of Record

November 25, 1992